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WTK HOLDINGS BHD

v.

FOO SAE HENG & ANOR

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
KANG HWEE GEE JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02-2197-2009]

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26 JULY 2010

CIVIL PROCEDURE: *Action - Limitation - Cause of action - Whether claim time barred under s. 6(1) Limitation Act 1953 - Burden of proof - Whether lay on plaintiff - BPI International Finance Ltd v Tengku Abdullah Ibni Sultan Abu Bakar - Whether findings of judge justified on evidence - Limitation Act 1953, ss. 26(2), 27(2)*

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This was an appeal by the appellant WTK Holdings Bhd ('the defendant') who was dissatisfied with the decision of the High Court wherein the claim by the respondents herein ('the plaintiffs') was allowed in respect of, *inter alia*, specific performance of an agreement and a balance of RM420,000 with interest thereon. The issue that arose was whether the learned judge had erred in holding that the plaintiff's claim was not time barred under s. 6(1) of the Limitation Act 1953. The question whether the plaintiffs' claim was time barred turned upon the question whether the sum of RM100,000 paid by Westmont Land (Asia) Berhad to the plaintiffs on 5 February 1997 was a payment made on behalf of the defendant. By operation of s. 26(2) and 27(2) of the Limitation Act 1953, if the payment by Westmont Land was found to have been made on behalf of the defendant, then for the purposes of limitation of the plaintiffs' cause of action, time began to run from 5 February 1997. That meant that the plaintiffs' action filed on 31 December 2002 was not time barred. On the other hand, if the RM100,00 part payment was not found to be paid on behalf of the defendant, then time for the purpose of limitation would began to run from 13 September 1995 when the defendant made its last part payment. In that event, the plaintiffs' action would be time barred.

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Held (allowing defendant's appeal; setting aside order of High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) When the question of limitation is raised by the defendant, it is for the plaintiff to prove the cause of action it relies on is not time barred (*BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar*). The learned judge did not explain why he accepted the testimony of PW1 that it was a payment by Westmont Land as an agent for and on behalf of the defendant. The mere fact that a company is an associate company does not necessarily mean it makes payment as an agent. It was at best inconclusive. (paras 14 & 17)

(2) The finding of the learned judge was not justified on the evidence and was clearly wrong. His approach as to burden of proof was wrong. The evidence before the learned judge could not support a finding that the plaintiffs had discharged the burden that was upon them to prove that the payment made on 5 February 1997 was made by Westmont Land as agent for the defendant. Even though the finding of the learned judge was a finding of fact, his finding was not based upon any assessment of veracity of PW1 that displayed and rested upon any special advantage he had as a trial judge from seeing and hearing the PW1 tested in cross examination, and he had not considered all of the evidence before him. The plaintiffs had failed to prove that the part-payment by Westmont Land was as agent for the defendant who owed the sum to the plaintiffs. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu WTK Holdings Bhd ('defendan') yang tidak puas hati dengan keputusan Mahkamah Tinggi di mana tuntutan responden ('plaintif-plaintif') dibenarkan berhubungan, antara lain, pelaksanaan spesifik satu perjanjian dan jumlah RM420,000 dengan faedah. Isu yang timbul adalah sama ada yang arif hakim telah khilaf apabila memutuskan bahawa tuntutan plaintif-plaintif tidak dihadkan oleh masa di bawah s. 6(1) Akta Had Masa 1953. Persoalan sama ada tuntutan plaintif-plaintif dihadkan oleh masa adalah berdasarkan soalan sama ada jumlah RM100,000 yang dibayar oleh Westmont Land (Asia) Berhad

kepada plaintif-plaintif pada 5 Februari 1997 adalah bayaran yang dibuat bagi pihak defendan. Melalui operasi s. 26(2) dan 27(2) Akta Had Masa 1953, jika bayaran oleh Westmont Land diputuskan dibuat bagi pihak defendan, bagi tujuan had masa kausa tindakan perayu, masa bermula pada 5 Februari 1997. Itu bermakna tindakan plaintif-plaintif yang difailkan pada 31 Disember 2002 tidak dihadkan oleh masa. Tetapi, jika bayaran RM100,000 adalah pembayaran bahagian yang tidak dibuat bagi pihak defendan, masa untuk tujuan had masa bermula pada 13 September 1995 apabila defendan telah buat pembayaran bahagian terakhir. Dalam keadaan tersebut, tindakan plaintif-plaintif dihadkan oleh masa.

Diputuskan (membenarkan rayuan defendan; mengenepikan perintah Mahkamah Tinggi)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Apabila soalan had masa dibangkitkan oleh defendan, ia adalah untuk plaintif membuktikan kausa tindakan tersebut tidak dihadkan oleh masa (*BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar*). Yang arif hakim tidak menjelaskan mengapa beliau menerima testimoni PW1 bahawa ia adalah bayaran oleh Westmont Land sebagai ejen untuk dan bagi pihak defendan. Hanya fakta bahawa sesuatu syarikat adalah syarikat sekutu tidak bermakna ia membuat bayaran sebagai ejen. Ia tidak konklusif.

(2) Dapatan yang arif hakim tidak diwajarkan atas keterangan dan dengan jelas adalah salah. Pendekatannya mengenai beban membuktikan adalah salah. Keterangan di hadapan yang arif hakim tidak boleh menyokong dapatan bahawa plaintif-plaintif telah melepaskan beban pembuktian untuk membuktikan bahawa bayaran yang dibuat pada 5 Februari 1997 dilaksanakan oleh Westmont Land sebagai ejen untuk defendan. Walaupun dapatan yang arif hakim adalah dapatan fakta, dapatannya tidak berdasarkan penilaian kebenaran PW1 yang dipamerkan dan tertumpu pada mana-mana manfaat khas yang dipunyai hakim bicara dari melihat dan mendengar PW1 diperiksa balas, dan beliau tidak mempertimbangkan semua keterangan yang ada di hadapannya. Plaintif-plaintif telah gagal membuktikan bahawa pembayaran sebahagian dari Westmont Land adalah sebagai ejen bagi defendan yang berhutang pada plaintif-plaintif.

Case(s) referred to:

APV Hill & Mills (M) Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor [2006] 1 CLJ 370 CA ***(refd)***

BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 CLJ 599 CA ***(refd)***

Clarke v. Edinburgh & District Tramways Co [1919] SC (HL) 35 ***(refd)***

Ming Holdings (M) Sdn Bhd v. Yusof Latif Holdings (M) Sdn Bhd [2006] 3 CLJ 72 CA ***(refd)***

Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Chin Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Samaworld Asia Sdn Bhd & Anor v. RHB Bank Bhd [2008] 6 CLJ 44 CA ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1), 26(2), 27(2)

For the appellant/defendant - Sean HM Yeow (R Himahlini with him); M/s Lee Hishammuddin Allen & Gledhill

For the respondents/plaintiffs - SL Toh; M/s SB Cheah & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-1535-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] This is an appeal by the appellant WTK Holdings Bhd (hereinafter referred to as "the defendant") who is dissatisfied with the decision of the High Court made on 10 September 2009 wherein the claim by Foo Sae Heng @ Foo Sea Hing and Yeo Tat Chew, the respondents herein (hereinafter referred to as "the plaintiffs") was allowed in respect of:

(a) specific performance of an agreement dated 30 August 1994;

(b) balance of RM420,000 with interest thereon; and

(c) costs to be taxed.

[2] We had allowed the appeal with costs and set aside the judgment of the High Court. We set out our reasons below.

[3] We appreciate the decision of the appellant to proceed only with the 5th ground in their 6-ground memorandum of appeal. The written submission for the defendant in this appeal is very similar to the submission submitted in the High Court. The written submission for the plaintiff is a shortened version. Notwithstanding their well written submissions, counsel for the parties proceeded to take over an hour to submit orally on the single issue in the 5th ground that the learned judge erred in holding that the plaintiffs' claim was not time barred under s. 6(1) of the Limitation Act 1953 (Revised 1981) Act 254. Being further repetition, we do not think it was necessary to take up substantial time we can ill-afford for oral submissions.

[4] As a matter of general principle, when the defence of limitation is raised, the burden is upon the party relying upon the cause of action so impugned to prove it is brought within the period of limitation. See *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504, applied in *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599 CA.

[5] The question whether the plaintiffs' claim is time-barred turns upon the following question which was set out in the list of questions to be tried before the learned judge:

> Sama ada bayaran sebanyak RM100,000.00 yang dibayar oleh Westmont Land (Asia) Berhad kepada Plaintif-plaintif pada 5.2.1997 merupakan suatu bayaran yang dibuat bagi pihak Defendan ataupun WHSB?

which may be translated as follows:

> Whether the sum of RM100,000.00 paid by Westmont Land (Asia) Berhad to the Plaintiffs on 5.2.1997 was a payment made on behalf of the Defendant or WHSB?

[6] WHSB refers to Westmont Holdings Sdn Bhd (hereafter "Westmont Holdings") and Westmont Land (Asia) Berhad is hereafter referred to as "Westmont Land".

[7] The significance of the question above is that the payment of RM100,000 on 5 February 1997 is a part-payment and not made by the defendant itself but by a third party, Westmont Land. By operation of ss. 26(2) and 27(2) of the Limitation Act, if the payment by Westmont Land is found to have been made on behalf of the defendant, then for the purposes of limitation of the plaintiffs' cause of action, time begins to run from 5 February

1997. That means that the plaintiffs' action filed on 31 December 2002 is not time-barred. On the other hand, if the RM100,000 part-payment is not found to be paid on behalf of the defendant, then time for the purpose of limitation would begin to run from 13 September 1995 when the defendant made its last part-payment. In that event, the plaintiffs' action would be time-barred.

[8] At the trial, the plaintiffs relied upon the testimony of the 2nd plaintiff, Yeo Tat Chew (PW1), and the two cheques by Westmont Land as evidence that the payment made on 5 February 1997 was made on behalf of the appellant. The defendant called one Bong Wee Khong (DW1), manager at WTK Holdings Sdn Bhd. DW1 said in his witness statement that the appellant had divested its equity share in Westmont Land in September 1996 to WHSB. Under cross-examination he agreed that the divestment was subject to the approvals of the relevant authorities and that there was no evidence that those approvals had been obtained.

The Grounds Of Judgment

[9] The appeal before this court is that the learned judge had erred in holding the plaintiffs' claim was not time-barred. We examined the grounds of judgment of the learned judge. He came to his conclusion that the claim is not time-barred (Rekod Rayuan Jilid 1, p. 54, para 11.1) on the basis of his acceptance of the evidence of PW1 that the payment of RM100,000 on 5 February 1997 by Westmont Land was payment made on behalf of the defendant (Rekod Rayuan Jilid 1, pp. 51-54, para 10-10.10).

[10] We examined para. 10 of his judgment.

[11] The learned judge arrived at his finding after holding that:

(a) the statement "In September 1996 the group divested its entire 17.18% equity in Westmont Land for a total cash consideration of RM112.50 million." as inconclusive because DW1 in cross-examination has agreed that the divestment of Westmont Land is subject to the approval of the relevant authorities and there are no documents to show that these approvals had been obtained (para. 10.1);

(b) It is for the defendant to prove that Westmont Holdings had been registered as shareholders of Westmont Land by producing the company search of Westmont Land which the defendant has failed to do (para 10.2);

A (c) The statement that "In December 1996 the company divested its entire 61.11% equity investment in Westmont Construction Sdn Bhd for a total cash consideration of RM1.1 million." (para 10.3) is not conclusive because:

B (i) a company search shows the defendant is still the registered holders of the said 1,100,000 shares of Westmont Construction (para 10.4).

(ii) Westmont Holdings is not registered as a share holder of Westmont Construction shares (para 10.5).

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(iii) The defendant has not proved that the sale of the 1,100,000 shares of Westmont Construction to Westmont Holdings has been completed (para 10.6).

D (d) Westmont Holdings has not been wound-up because DW1, in cross-examination, agreed that there are no documents to support his evidence that Westmont Holdings has been wound-up (para 10.4).

E **[12]** The learned judge held at para. 10.7 that the payment made by Westmont Land on 5 February 1997 could not have been made on behalf of Westmont Holdings. He gave the following reasons:

(a) PW1 has stated that there is

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(i) no contract between the plaintiffs and Westmont Land;

(ii) no contract between the plaintiffs and Westmont Holdings;

(b) Westmont Holdings did not execute the share sale and
G novation agreement so there is no binding agreement between the plaintiffs and Westmont Holdings.

(c) The payment was not made in accordance with the terms of the share sale and novation agreement, wherein cl. 5.1
H provides that the purchase price was to be paid on 5 August 1996.

(d) Under the share sale and novation agreement, there is no provision for part-payment.

I (e) There are no accompanying letters for the two payments of RM50,000 each *vide* Westmont Land cheques dated 5 February 1997 to state the two payments were made on behalf of whom and for what purpose.

(f) The 1,100,000 Westmont Construction shares which the defendant agreed to sell to Westmont Holdings under the share sale and novation agreement are still registered in the name of the defendant.

[13] Then saying that PW1 had explained how the payment of RM100,000 on 5 February 1997 by way of cheques issued by Westmont Land came about, that:

(a) PW1 had been chasing for money from the defendant and the payment was then given to the plaintiffs as part-payment of the outstanding amount due to them for the Westmont Construction shares; and

(b) in re-examination, PW1 confirmed that payment of RM100,000 was made on behalf of the defendant,

the learned judge accepted the evidence of PW1 that the payment of RM100,000 on 5 February 1997 by Westmont Land was made on behalf of the defendant and not Westmont Holdings and it was towards the purchase of shares under the subscription agreement.

Conclusions

[14] From the foregoing we note that the learned judge had proceeded to examine and dismiss the evidence put before him as inconclusive for the purpose of inferences as to limitation sought by the defendant, and after holding that the payment made by Westmont Land on 5 February 1997 could not have been made on behalf of Westmont Holdings, he accepted the testimony and explanation of PW1 that it was on behalf of the defendant. He had proceeded upon the basis the defendant had failed to prove that Westmont Land was no longer its associate company.

[15] Firstly, this is contrary to the decision of this court in *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar (supra)*. The principle that is accepted in that case is that when the question of limitation is raised by the defendant, it is for the plaintiff to prove the cause of action it relies on is not time-barred, for example, by proving that the payment by Westmont Land (a) was a part-payment by Westmont Land and (b) it was on behalf of the defendant.

[16] Secondly, the learned judge did not explain why he accepted the testimony of PW1 that it was a payment by Westmont Land as an agent for and on behalf of the defendant. The learned judge did not say in his grounds of judgment whether it was upon his assessment of the veracity of PW1 who he had the opportunity and advantage of seeing and hearing while his testimony was tested. There was no note on the point of veracity recorded on the record. *Clarke v. Edinburgh & District Tramways Co* [1919] SC (HL) 35 relied upon in *Ming Holdings (M) Sdn Bhd v. Yusof Latif Holdings (M) Sdn Bhd* [2006] 3 CLJ 72 CA is not applicable. The basis he relied upon is therefore no better than that this appellate court has access to. From the record of proceedings we see no basis for logic that because the payment was not likely to have been made for Westmont Holdings, it must have been made for the defendant.

[17] Thirdly, the mere fact that a company is an associate company does not necessarily mean it makes payment as an agent. It is at best inconclusive. Hence, even if Westmont Land is still an associate company of the defendant, payment by Westmont Land is not necessarily on behalf of Westmont Holdings.

[18] Fourthly, the finding did not consider the documentary evidence (Rekod Rayuan Jilid 4, p. 250) that Dato' Joseph Chong, the Managing Director of Westmont Holdings, ceased to be a director of the defendant on 23 May 1996, and the defendant's executive chairman's statement dated 15 May 1997 in the 1996 annual report of the company, that the group divested its entire holdings in Westmont Land in September 1996 (Rekod Rayuan Jilid 4, p. 245).

[19] An open question is why Westmont Land would pay such a substantial sum of RM100,000 to the plaintiffs. But even if any reason is not known, it does not necessarily mean Westmont Land was necessarily paying as agent for the defendant.

[20] We are satisfied that the finding of the learned judge is not justified on the evidence and is clearly wrong. His approach as to burden of proof was wrong. From the record before us, the evidence before the learned judge cannot support a finding that the plaintiffs had discharged the burden that is upon them to prove that the payment made on 5 February 1997 was made by Westmont Land as agent for the defendant. Even though the

finding of the learned judge is a finding of fact, his finding was not based upon any assessment of veracity of PW1 that displays and rests upon any special advantage he had as trial judge from seeing and hearing the PW1 tested in cross-examination, and he had not considered all of the evidence before him. The principle set out in *Samaworld Asia Sdn Bhd & Anor v. RHB Bank Bhd* [2008] 6 CLJ 44 CA; *APV Hill & Mills (M) Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor* [2006] 1 CLJ 370 CA; *Pekan Nenas Industries Sdn Bhd v. Chang Chin Chuen & Ors* [1998] 1 CLJ 793 FC are therefore not applicable to this case.

[21] Since the plaintiffs had failed to prove that the part-payment by Westmont Land was as agent for the defendant who owed the sum to the plaintiffs, we allowed the appeal by the defendant with costs and set aside the order of the High Court.